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VISA U.S.A. INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VISA U.S.A. INC.,

Plaintiff,

vs.

MARITZ INC., d/b/a MARITZ LOYALTY MARKETING,

Defendant.

Case No. CV-07-5585 JSW

PLAINTIFF VISA U.S.A. INC.'S OPPOSITION TO DEFENDANT MARITZ INC.'S ADMINISTRATIVE REQUEST TO CONTINUE THE HEARING DATE ON VISA U.S.A. INC.'S MOTION TO COMPEL ARBITRATION; AND *EX PARTE* APPLICATION FOR DISCOVERY

In July 2007, defendant Maritz Inc. ("Maritz") and plaintiff Visa USA Inc. ("Visa") entered a Letter Agreement that established a procedure for resolving all disputes that existed between them "outside of court." Pursuant to that agreement, on November 2, 2007, Visa filed an arbitration demand with the AAA. Maritz's request for *ex parte* relief is just the latest in a series of tactics designed to delay the dispute resolution process to which it agreed.

Maritz's second *ex parte* application asks both that Visa's pending motion to stay be continued 60 days and that Visa be ordered to provide broad and far reaching expedited discovery. Maritz's *ex parte* application fails for at least two independent reasons. First, whatever urgency Maritz claims justifies its application is entirely of its own making – in early December, Visa informed Maritz of the February 8 hearing date and invited Maritz to identify whatever discovery it believed was necessary regarding its claim the Letter Agreement was invalid. Although on December 7 Maritz pledged to respond to Visa's "questions about discovery as soon as [Maritz] can," Maritz waited until January 10, 2008 to specify its requested discovery. Second, Maritz has not shown that there is any genuine issue of material fact that demonstrates a need for the requested discovery. There can be no real dispute as to what transpired between the parties in the negotiations leading up to the execution of the Letter Agreement and thus there is no need for any discovery in connection with Visa's motion.

I. SUMMARY OF FACTS

Maritz failed to honor its contractual obligation to develop and deliver a time-critical rewards program to Visa. After the underlying contract was terminated and after disputes arose between the parties, in July 2007, Visa and Maritz entered the Letter Agreement which required that all of the parties' claims would be resolved "outside of court."

On November 2, 2007, Visa filed a Complaint to compel arbitration pursuant to the Letter Agreement. (D.E. # 1.) Visa then filed a petition to compel arbitration. (D.E. # 4.) On November 30, Maritz declined to proceed before Magistrate Judge Zimmerman, an act that automatically vacated Visa's then pending motion. After the case was reassigned to this Court, on December 7, Visa informed Maritz that Visa would reset its motion for the first available hearing date (February 8). At that time Visa asked Maritz to identify whatever discovery Maritz

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felt was necessary regarding Visa's request to enforce the Letter Agreement:

> Although, . . . , Visa does not believe any discovery is necessary for a determination of that Petition, the February 8 date will allow Maritz ample opportunity to pursue whatever discover[y] it believes is needed. Please [l]et us know promptly if Maritz in fact wishes to pursue discovery. . . . . To try to make this clearer: we need to know what discovery (if any) Maritz believes is needed so that we can both (a) determine whether Visa will also seek discovery responsive to Maritz's requests and (b) get the discovery scheduled.

(*See* Declaration of Roderick M. Thompson In Support of Visa's Opposition to Maritz's *Ex Parte* Application ("Thompson Decl."), Ex. A.) Maritz immediately acknowledged receipt of that email, stating that "We will get back to you on your questions about discovery as soon as we can." (*Id.*) Thereafter, however, Maritz did not ask for any discovery from Visa.

On January 4, Visa filed its Motion to Stay Action and Compel Arbitration setting that motion for hearing on February 8. (D.E. # 26.) Not until January 10, however, did Maritz request any discovery; on that date, Maritz demanded up to 5 depositions (4 individuals and a Rule 30(b)(6) deposition on unspecified topics) and the production of unidentified documents.[1] Visa responded by offering to consider limited discovery targeted to that narrow issue raised by Maritz – "alleged fraudulent inducement into the Letter Agreement." Maritz, however, rejected that overture and instead filed the instant *ex parte* application. In a further attempt to avoid burdening the Court with this *ex parte* application, Visa sent a letter offering again to participate in narrow, targeted discovery; Maritz rejected that offer. (*See* Thompson Decl., Ex. B and C.)

II. ARGUMENT

A. Maritz's *Ex Parte* Application Should Be Denied Both Because Any Alleged Crisis Justifying The Request Was Caused By Maritz And Because Maritz Has Not Demonstrated There is Any Genuine Issue Of Material Fact That Requires Discovery.

Ex parte applications are extraordinary requests that "are nearly always improper." *In re Antimagnetic Am. Inc.*, 101 B.R. 191, 192 (C.D. Cal. 1989). Indeed, Maritz fails to establish

[1] The breadth of Maritz's requested discovery also requires that the application be denied. S*ee Qwest Commc'ns Int'l, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 421 n.1 (D. Colo. 2003) ("the breadth of the[] discovery requests ha[d] a significant bearing on the court's decision to deny the motion for expedited discovery"). Moreover, nowhere in either its Application or the correspondence between the parties does Maritz identify either the topics for the requested 30(b)(6) deposition or the categories of documents it now seeks.

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either of the required elements for obtaining *ex parte* relief: (1) that Maritz is "without fault in creating the crisis that requires *ex parte* relief"; or (2) produce evidence showing that it "will be irreparably prejudiced" if the relief is not granted. *Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F.Supp.2d. 488, 492 (C.D. Cal. 1995).

1. To The Extent There Is Any "Crisis" Supporting Maritz's Request, Maritz's Own Conduct Has Caused That "Crisis."

Any claimed "crisis" justifying Maritz's extraordinary request for expedited discovery is entirely of Maritz's own making. As discussed above, in early December Visa informed Maritz that its motion would be heard on February 8 and invited Maritz to describe whatever discovery Maritz felt was needed to respond to that motion. Although Maritz pledged to get back to Visa "about discovery as soon as [Maritz] can," in fact Maritz did not do so.[2] (Thompson Decl., Ex. A.) Maritz's decision to delay its request for discovery is plainly the sole cause of the supposed "crisis" it now faces. For this reason alone, Maritz's *ex parte* application should be denied.

2. Maritz Has Not – And Cannot – Demonstrate That It Has Good Cause to Seek Expedited Discovery

Maritz's application rests entirely on its erroneous contention that it "is entitled to a jury trial."[3] (D.E. #33, Application, 1:14.) Maritz is wrong. A party is not entitled to a jury trial under 9 U.S.C. § 4 as a matter of right. *See Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992) ("party to an arbitration agreement cannot obtain a jury trial merely by demanding one") (citations omitted). Section 4 provides for a jury trial ***only*** if there is a ***genuine*** issue of ***material*** fact concerning the defenses of the party resisting arbitration. 9 U.S.C. § 4. Indeed, Maritz's own authority, *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126,

[2] Maritz's claim that it did not seek discovery earlier because it was waiting until Visa refiled its motion is not well taken for at least three reasons. (D.E. # 33, Application, 5:21-22.) First, Visa's original motion was only vacated as a result of Maritz's declination of Magistrate Zimmerman. Second, *nothing* Visa has done created any reasonable expectation on Maritz's part that the motion would not be refiled. Third, it was *after* Visa's original motion had been vacated that Maritz said it would respond to Visa's questions regarding discovery "as soon as [it] can."

[3] Moreover, discovery, even where not expedited, is not favored in threshold arbitrability court proceedings. *See Sankey v. Sears, Roebuck & Co.*, 100 F. Supp. 2d 1290, 1296 (M.D. Ala. 2000) (denying discovery request because "[a]rbitration proceedings are meant to be summary in nature and normally involve little discovery").

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129-130 (2d Cir. 1997), instructs that "the party requesting a jury trial must 'submit' evidentiary facts showing that there is a dispute of fact to be tried." Here, Maritz has provided no evidentiary facts supporting its request, much less any facts demonstrating that there is a genuine issue of material fact. Maritz's failure to do so dooms its *ex parte* request.

Maritz has failed to do so because it cannot. Simply put, no discovery is required, expedited or otherwise, because Visa had no duty to disclose the purportedly material "fact" – the amount of Visa's damages. The following **undisputed** facts demonstrate the point:

- Visa's April 20 termination letter states that Visa reserves all rights relating to any "claims Visa has against Maritz for Maritz's breaches of the Agreement . . . and Visa's rights to liquidated damages." (Thompson Decl., Ex.. D.)
- Visa's June 5 letter states that Visa will provide "information to Maritz as to the nature and amount of Visa's claims at the appropriate time." (Thompson Decl., Ex.. E.)
- Visa's July 2 letter states that it is now time to "discuss Maritz's claims, as well as the nature and amount of Visa's claims," but "[***b]efore*** starting that discussion, and to protect both parties, [Visa] believe[s] we should reach an understanding as to the process for resolving all claims in the event that something more than direct negotiation is required." That letter reiterates: "It is important to have this agreement on process in place ***before*** we commence negotiations so that both sides will know the alternative to a negotiated resolution." (Thompson Decl., Ex. F; emphasis added.)
- Following Maritz's receipt of the July 2 letter – which for the first time proposes arbitration – the only contact between parties that in any way related to the Letter Agreement[4] prior to its execution on July 10 were between Visa's outside counsel, Rod Thompson, and Maritz's Associate General Counsel, Steve Gallant. (Thompson Decl., ¶ 8, Ex. G.)

[4] Visa believes there is no dispute regarding what Mr. Thompson and Mr. Gallant said to one another during these discussions. Indeed, Mr. Thompson has already described those discussions in a sworn declaration in this matter. (D.E. #27.) To the extent there was any issue here, however, Visa's offer that each be deposed for two hours would have allowed Maritz to conduct discovery on this point if it so desired. (Thompson Decl., Ex. B.)

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These undisputed facts establish that Visa had no duty to disclose the "nature and amount" of its claims.[5] *See People v. Highland Fed. Sav. & Loan*, 14 Cal. App. 1692, 1718-19 (1993) (concealment not actionable absent duty to disclose). A duty to disclose arises where the party charged with fraud has volunteered information on a subject but withholds information that would materially qualify the information disclosed. *Brownlee v. Vang*, 235 Cal. App. 2d 465, 477 (1965). Here, there is no allegation that Visa volunteered any such information (and thus no such duty could have arisen); indeed, Visa expressly told Maritz that it would discuss the "nature and amount of Visa's claims" only ***after*** the parties had agreed to a procedure for resolving their disputes.[6]

Maritz attempts to justify its request by arguing that it needs to establish when Visa knew it had substantial claims against Maritz. (D.E. #33, Application, 4:17-5:3.) But Maritz fails to explain why whether Visa knew of the nature and amount of its damages in July 2007, the Fall of 2006 or any other time before the Letter Agreement was signed matters. This is because it does not – Maritz simply has no need for any such discovery.

III. CONCLUSION

Maritz has not established either any crisis justifying its request or that discovery will aid it in identifying a genuine issue of material fact. Accordingly, Visa respectfully requests that Maritz's *ex parte* application be denied.

DATED: January 16, 2008

FARELLA BRAUN & MARTEL LLP

By: /s/ Roderick M. Thompson
Roderick M. Thompson
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[5] There can be no doubt that this is the crux of Maritz's claim. (*See* D.E. #19, Counterclaim, ¶118 (alleging that Visa failed to disclose "the nature and magnitude of its alleged claims.")

[6] Maritz's reliance on C*icone v. URS Corp.*, 183 Cal. App. 3d 194 (1986) is misplaced. (D.E. #33, Application, 3:25-28). In *Cicone*, opposing counsel was alleged to have made a knowing affirmative misrepresentation to induce the other side to enter a contract. The case, therefore, stands for the unremarkable proposition that "[a]lthough a duty to disclose a material fact normally arises only where there exists a confidential relation between the parties or other special circumstances require disclosure, where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated." *Id.* at 201. Here, by contrast, there is no allegation that Visa made any representation whatsoever regarding the scope of its damages claim.

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